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HAROLD B. WILLEY, Cle

No. 437

In the

Supreme Court of the United States

OCTOBER TERM, 1954

WILLIAM FRANK MONROE, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT AND SUPPORTING BRIEF

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PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner, William Frank Monroe, respectfully submits his petition for a writ of certiorari to review the decree of the United States Circuit Court of Appeals from the Fifth Circuit in the above entitled cause.

The Circuit Court of Appeals for the Fifth Circuit has affirmed the order of the District Court of the United States for the Northern District of Texas denying petitioner's application to reverse the judgment of the trial court and to render judgment in favor of the appellant.

STATEMENT OF THE CASE

In this case the petitioner, William Frank Monroe, was charged by bill of indictment in five counts with violating the law pertaining to collection and payment of income tax.

The first count charges in substance that about the 15th day of March, 1947, in Dallas, Dallas County, Texas, in the Dallas division of the Northern District of Texas, that he did wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by him to the United States of America for the calendar year of 1946 by filing and causing to be filed with the Collector of Internal Revenue for the Second Internal Revenue Collection District of Texas at Dallas, Texas, a false and fraudulent income tax return wherein he stated that his adjusted gross income for said calendar year computed on a community property basis was the sum of $2,343.74 and the amount of tax due and owing thereon was the sum of $210.00, whereas, as he then and there well knew his adjusted gross income for the said calendar year computed on a community property basis was $5,564.36 and his net income for the said calendar year computed on a community property basis was the sum of $5,064.36 upon which said net income he owed to the United States of America an income tax of $813.90, which was in violation of the Internal Revenue laws of the United States.

The second count in the indictment charges substantially the same offense on the part of the defendant with reference to making out a report and payment of taxes upon the income of his wife, Jane Elizabeth Monroe.

The third count charges a similar offense on the part of the petitioner William Frank Monroe with reference to his taxes for the calendar year of 1947.

The fourth count has reference to the 1947 taxes of his wife, Mrs. Jane Elizabeth Monroe.

The fifth count embraces a report on the income of both himself and wife for the year of 1948.

To each of these counts the petitioner pled not guilty and filed a motion to suppress the evidence because it was obtained in violation of the Fourth and Fifth Amendments to the Constitution and contrary to the promises of immunity offered by the Treasury Department as well as its agents to this petitioner, upon him making a voluntary disclosure of such unreported income. The court held the motion to suppress in abeyance subject to hearing the evidence of the Government and upon the conclusion of the evidence submitted by the Government, the petitioner renewed his motion to suppress and moved for acquittal. The court then held both motions in abeyance until the petitioner concluded his evidence. The motions were renewed at the conclusion of petitioner's evidence and the court then ordered that both motions be held in abeyance until the jury passed upon the matter. The jury found the petitioner guilty on all five counts and the court then overruled the motion to suppress and the motion for acquittal. The court then assessed a fine of $3,000.00 and six months jail sentence. The petitioner filed a motion for new trial setting out all of the points of error which were presented to the Circuit Court of Appeals. The court overruled petitioner's

motion for new trial, to which the petitioner excepted and duly perfected his appeal. That the Circuit Court of Appeals for the Fifth Circuit affirmed the judgment of the trial court, to which judgment the petitioner excepted and filed a motion for re-hearing. The motion for re-hearing was denied, to which the petitioner excepted and gave notice of appeal to the Supreme Court of the United States.

OPINION BELOW

The opinion of the Circuit Court is reported, *215 F. 2d 81*. The opinion of the Trial Court is contained, *110 F. Supp. 507*.

STATEMENT OF JURISDICTION

This court is authorized by *Section 240 of the Judicial Code, as amended (36 Stat. 1157, 43 Stat. 938; 28 U. S. C. A., Sec. 347)*, to review on certiorari the judgment of the Circuit Court. That statute reads in part as follows:

> "In any case, civil or criminal, in a Circuit Court of Appeals, * * * it shall be competent for the Supreme Court of the United States, upon petition of any party thereto, * * * to require by certiorari, either before or after a judgment or decree of such lower court, that the case be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal (28 U. S. C. A., Sec. 347(a)."

The judgment of the Circuit Court was rendered on August 5th, 1954. A timely motion for rehearing was denied by that court on October 11, 1954, and this petition

for review on writ of certiorari will be filed within sixty days after the notice of filing of the appeal as required by Rule, 11, Revised Rules of the Supreme Court, effective July 1, 1954.

Petitioner adopt the foregoing summary statement of the case on pages 2-4 as a part of this jurisdictional statement.

QUESTIONS PRESENTED

The questions on which a review is sought, by the record in this case, are as follows:

The errors relied on for reversal were filed in the Trial Court and the Circuit Court of Appeals in connection with our petition for appeal in those courts, and are included in our petition for appeal to the Supreme Court of the United States, and are as follows:

1. Whether the petitioner was entitled to have excluded all evidence given by him to agents of the Treasury Department on the promise of immunity offered by the Treasury Department under its policy of voluntary disclosure.

2. Whether petitioner's rights guaranteed under the Fourth and Fifth Amendments to the Constitution of the United States were violated by the giving of evidence against himself relying on the promise of immunity from criminal prosecution made by the agents of the Treasury Department.

REASONS RELIED UPON FOR ALLOWANCE OF WRIT

Petitioner respectfully submits that this application for a writ of certiorari should be granted for each of the following reasons:

1. To give full force and effect to the existing appellate authority of the Supreme Court of the United States in the furtherance of justice.

2. The judgment of the Circuit Court of Appeals, which involves questions of local law, is in conflict with decisions of the Supreme Court of the State of Texas and the Court of Criminal Appeals of Texas (the highest criminal court in the state) in the cases of *In re: Abe H. Liebster, 91 Fed. 2d 814; White, etal. v. United States, et al., 194 F. 2d 215; United States v. Angelo A. Guerrina, 112 Fed. Supp. 26; Foley v. United States, 64 Fed. 2d 1; United States v. Di Re, 332 U. S. 581, 595, 92 L. Ed. 210, 220.*

3. The Circuit Court on opinion misinterpreted and misapplied Rule 41E of the rules governing criminal proceedings as promulgated by the Supreme Court of the United States, such rule pertaining to the suppression of evidence secured in violation of the Fourth and Fifth Amendments to the Constitution of the United States.

4. The question herein involved is an important question of federal error which has not been, but should be settled by this court.

WEREFORE, your petitioner respectfully prays that a writ of certiorari issue under the seal of this court

directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding said court to certify and send to this court a full and complete transcript of the record and of the proceedings of the Circuit Court of Appeals had in said cause, to the end that this cause may be reviewed and determined by this Honorable Court as provided by the statutes of the United States; and that the judgment herein of the said Circuit Court of Appeals be reversed by this Honorable Court, and for such further relief as to this court may seem proper.

Respectfully submitted,

HENRY KLEPAK,
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Dallas, Texas,
Counsel for Petitioner.

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UNITED STATES OF AMERICA,

Respondent.

BRIEF FOR PETITIONER

To the Honorable, the Supreme Court of the United States:

As permitted by Rule 38, petitioner attaches this supporting brief to his petition for writ of certiorari.

GROUNDS OF JURISDICTION

Petition adopts, as his grounds of jurisdiction, the jurisdictional statement on pages 4-5 of the foregoing petition for writ of certiorari.

STATEMENT OF THE CASE

Petitioner adopts, as his statement of the case, the summary statement of the case, pages 2-4 inclusive, and statement of jurisdiction, pages 4-5, of the foregoing petition for writ of certiorari.

QUESTIONS 1 AND 2 BEING GERMANE WILL BE GROUPED TOGETHER FOR DISCUSSION

Question 1 (Restated) Whether the petitioner was entitled to have excluded all evidence given by him to agents of the Treasury Department on the promise of immunity offered by the Treasury Department under its policy of voluntary disclosure.

Question 2 (Restated) Whether petitioner's rights guaranteed under the Fourth and Fifth Amendments to the Constitution of the United States were violated by the giving of evidence against himself relying on the promise of immunity from criminal prosecution made by the agents of the Treasury Department.

STATEMENT

Prior to commencement of trial of this case, petitioner filed his motion to suppress testimony (Tr. 7-22), alleging, in substance, that he had, pursuant to and in reliance on the advice of his accountants, and in further reliance on the annouced policy of the Treasury Department which had previously come to his attention, taken affirmative steps to voluntarily disclose to the Government that he had earned income for the years 1946, 1947 and 1948, a portion of which he had not reported. Further petitioner alleged he did the necessary things to complete his voluntary disclosure as required under said policy of the Government.

In addition petitioner contended that before the giving of any specific information in regard to such disclosure he,

on his first contact with agents of the Government, informed them that his intention was to complete his already originated disclosure, inquired if those who did make voluntary disclosures were not immunized from prosecution and was informed that such was the policy of the Government. Subsequently petitioner gave freely and fully the information which eventually convicted him.

Thus petitioner contends his protection guaranteed by the Fourth and Fifth Amendments to the Constitution of the United States has been violated, his rights illegally stripped from him—his motion to suppress should have been sustained and the Trial Court erred in not so doing, as did the United States Court of Appeals in its apparent sustenance of such error.

ARGUMENT AND AUTHORITIES

At all times material hereto, the Treasury Department of the United States had a long established policy of granting immunity from criminal prosecution to even the wilful and criminal tax evader upon his making a voluntary disclosure to the department that he had earnings which had previously not been reported. This policy has many times been published and made known to the public generally in efforts by the Treasury Department to induce tax evaders to report their income. Cronologically a few are listed below:

On May 28, 1945, former Secretary of the Treasury Morgenthau stated at a press conference:

> "That some taxpayers who have failed to declare their full income and pay the tax due 'may escape

criminal prosecution through voluntary disclosure of the deficiency only in cases where such voluntary disclosure is made before investigation is started'." Tax Frauds and Voluntary Disclosures, University of Southern California Tax Institute, 1948 Major Tax Problems, 383, 394.

On August 21, 1945, former Secretary of the Treasury Vinson, as a guest contributor to Drew Pearson's column, made a statement pertaining to this subject, which column appeared in the Dallas Morning News.

Then again on October 15, 1945, the then Commissioner of Internal Revenue released the following statement to the press:

> "The Commissioner said that since June 1, some 30,000 delinquent or amended returns had been filed voluntarily, accounting for additional taxes of more than $50,000.00. Mr. Nunan again stressed the bureau policy of refraining from instituting criminal proceedings against taxpayers who come forward voluntarily and pay up delinquencies plus interest and civil penalties before the bureau has begun investigating their cases."

On August 7, 1946, Secretary of the Treasury John W. Snyder said:

> "* * * that in accordance with Treasury custom, there would be no criminal prosecution of the taxpayers who voluntarily remembered and reported their tax delinquencies."

Again on May 14, 1947, J. P. Wenchel, the then chief counsel of the Bureau of Internal Revenue, said in the course of an address:

> "The law requires the prosecution of the tax evader and that is what the department recommends to the Attorney General.
>
> "There is one important exception to that. The department has broad discretionary power long recognized by Congress to determine the policy and procedure for the effective enforcement of the Internal Revenue laws. The department, acting under that power, does not recommend prosecution of the evader who repents in time. There is nothing new in the position. Where the taxpayer makes a voluntary disclosure of intentional evasion before investigation has been initiated, criminal prosecution will not be recommended.
>
> "The department has always encouraged voluntary disclosures.
>
> "And what is a voluntary disclosure? A voluntary disclosure occurs when a taxpayer of his own free will and accord, and before any investigation is initiated, discloses fraud upon the Government. Healthy administration of the Internal Revenue laws long ago dictate that policy and I believe that its worth is obvious.
>
> "The making of a voluntary disclosure is a simple thing. The taxpayer or his legal agent can go before any official of the Bureau of Internal Revenue or any of its field offices—whether it is the collector, a deputy collector, a revenue agent, a special agent, or any other responsible Treasury officer. There is no special form for making the disclosure. The simple statement that 'I have filed false tax returns and I want to make the Government whole,' would constitute a complete disclosure. Of course, it is best usually to present an amended return or other written document as evidence

of the disclosure. If possible, the disclosure should be accompanied by payment of the tax which is known to be due, but this is not a prerequisite." Speaking before the 1947 Tax Executives Institute, New York City, reprinted in 25 Taxes 485.

It is, perhaps, interesting to note the testimony of J. M. Cooner, special agent in charge of the Dallas Intelligence Unit of the Internal Revenue Department, concerning such policy, particularly that pertaining to an article appearing in the Dallas Morning News, January 14, 1952, which quoted or as Mr. Cooner would have it, misquoted him as saying "* * * if the taxpayer admitted he failed to report income, before prosecution was begun, he could escape prosecution." (Tr. 471.)

The law appertaining is somewhat limited, and to some extent confused. The salient points of confusion seem to be predicated on two points—when must disclosures be made to be considered timely; and, whether the Government may at its election avoid their promises and prosecute, regardless of a taxpayer's conformity therewith. Both of these, however, have now been, petitioner feels, clearly and succinctly resolved in various decisions.

One case which clearly differs factually will, at the outset, be mentioned only in anticipation of Government reliance on the same, as previously indicated.

In *United States v. Lustig (C. A. A. 2, 1947), 163 F. 2d 85, cert. den. 1947, 332 U. S. 775,* substantially all unreported income was in the possession of the Government before contact was made with the taxpayers. Their conten-

tion of voluntarily disclosing such income was that they did so by depositing the income in various banks. In addition they plead an oral disclosure to a collector, which was denied by the latter. It will become distinctly obvious that the facts in such case are not controlling in the case at bar.

Before discussing the authorities upon which petitioner relies there should be elaborated certain facts. Putting aside for the moment the question of wilful intent to defraud, petitioner realized in the middle of April 1948 that he had earned monies which constituted income in 1946, 1947 and 1948 which he had not reported (Tr. 499-501). In November or December of 1948 petitioner testified he confided in his bookkeeper, one Jim Britton, and sought his advice in solving his dilemma (Tr. 503); that pursuant to such advice (Tr. 504) he employed one Harold Evans, a certified public accountant, and Cecil Butler, an accountain in the former's firm (Tr. 505), doing so in the first part of January 1949 (Tr. 505), at which time he further disclosed his problem and sought their advice for a solution (Tr. 505). Due to his failure to have books and records making a correct amended return impossible, he was advised to compile a list of what income he could remember, and said accounting would put it in his 1948 return for the purpose of notifying that same was previously unreported income (Tr. 505-508); that he relied on and followed said accounting firm's advice (Tr. 509). Further petitioner testified that said accountants further advised him that his 1948 return when filed would cause an investigation of the income thus reported and that when

representatives of the Government came to check his returns he was to explain his situation to them and cooperate to the fullest extent (Tr. 511; that by so doing he would be protected by the immunity granted those making a voluntary disclosure (Tr. 511). That on August 7, 1950, approximately eighteen months later, Messrs. Klein and Robertson, agents of the Internal Revenue, did appear at his place of business, requested to see the 1948 return for Monroe Buick Agency (Tr. 511) and at such time petitioner, Cecil Butler, his accountant and Jim Britton, his bookkeeper, informed said agents upon arrival that the books and records would not reflect an additional thirteen thousand ($13,000.00) dollars reported in the 1948 return, which was an estimate of unreported income earned in the years 1946-48. (Tr. 513.) Further petitioner on such occasion advised Agent Klein that he was making a voluntary disclosure. (Tr. 307, 514.) Agent Klein testified that from August 7, 1950, to February, 1951, petitioner gave him information (Tr. 318), that never once was the petitioner told that such information would be used for prosecution (Tr. 319); that not until February 27, 1951, after all the information had been secured, was petitioner even warned that such evidence *could* be used against him (Tr. 319), and further that said agent recalled petitioner asking about the immunity granted under the policy of voluntary disclosure (Tr. 319) and that said agent agreed that voluntary disclosures would not be prosecuted (Tr. 319, 414). Said agent further admitted that petitioner informed him of the hiring of the accountants and their ensuing advice (Tr. 410, 412, 414, 416). Practically all of the above facts

were substantiated by the testimony of Chester James Britton (Tr. 612-636) and Cecil Butler (Tr. 636-658). The record is replete with information given to the agents by petitioner (Tr. 308, 309, 311, 314, 315, 316, 317, 318, 320, 360, 361, 362, 363, 366, 367, 375, 381, 382, 383, 384), including how he made his income from buying and selling automobiles, approximately the number he bought from eighteen different individuals, the names he did or might have purchased such vehicles in, the approximate price he paid for them and the approximate sales price, gifts he had received from various persons, and cooperated in every requested way. The agents, however, upon first visiting petitioner had only information from two sources, the total of which was less than the additional income reported by the petitioner in his 1948 return.

It might be well to point out that petitioners' case was Agent Klein's first penal case (Tr. 448).

The above resume of the factual pertinences applicable to petitioner's motion to suppress, we feel, is closely analogous to the cases: *United States of America v. Angelo A. Guerrina (D. C. E. D. Pa., 1952), 112 Fed. Supp. 26*, and *In re Abe H. Liebster (D. C. E. D. Pa., 1950), 91 Fed. Supp. 814*.

In the *Liebster* case, supra, after assignment of the taxpayer's returns to the special agent by the Treasury Department, and almost a month after the latter's visit to the taxpayer and the perusal through his files, the taxpayer wrote a letter to the Commissioner of Internal Revenue

advising he would file amended returns for the years in question and would pay the taxes and interest thereon. He was aware of the voluntary disclosure policy at such time. The court found as a fact that the taxpayer had no notice that he was under investigation at such time. Thereafter the taxpayer cooperated fully with investigators. In his conclusions of law, Judge Welsh found the taxpayer's voluntary disclosure was induced by the department's policy of granting immunity from prosecution in such cases; that though a disclosure must be made prior to the initiation of an investigation to come within the policy, the taxpayer did not know or believe he was under investigation, that his rights guaranteed under the Fifth Amendment would be violated if the information supplied by him if such were to be used against him, and his motion to suppress was accordingly granted. On October 12, 1950, the Solicitor General authorized "no appeal" therein.

It seems most obvious that petitioner's position is in the very least as good as the taxpayer's in the foregoing case, in view of petitioner's good faith attempts, no matter how erroneous, more than eighteen months prior to Government visitation, and in further view of the uncontradicted disclosures by the petitioner on the first day of the Government agent's visit.

In the *Guerrina* case, the taxpayer sought to suppress evidence which he contended was obtained in violation of his rights afforded by the Fourth and Fifth Amendments. Here, extensive quotations, self explanatory, and we believe, would in all probability expound that which to peti-

tioner seems the most logical, sound and sensible approach to the intricate problem before us:

> "The second question is a bit more difficult of determination. Did he consent to the examination of the check stubs and other records which he himself made available to the agents? In order to determine the answer to this question, the circumstances under which the alleged consent was given must be borne in mind. Special Agent Pearson testified that the purpose of his presence at the office of the defendant was to obtain evidence of fraud for contemplated criminal proceedings, but this fact was not disclosed to defendant. Here so far as the defendant knew or had been informed his books and papers were being examined by Agent Coram to establish his proper civil liability. Nothing was said either by Agent Coram or by Special Agent Pearson to the defendant to appraise him of the true situation. As was stated in *Gouled v. United States, 255 U. S. 298, at page 305:*
>
> > " 'The prohibition of the Fourth Amendment is against all unreasonable searches and seizures; and if for a Government officer to obtain entrance to a man's house or office by force or by an illegal threat or show of force, amounting to coercion, and then to search for and seize his private papers, would be an unreasonable, and therefore a prohibited, search and seizure, as it certainly would be, it is impossible to successfully contend that a like search and seizure would be a reasonable one if admission were obtained by stealth instead of by force or coercion. The security and privacy of the home or office and of the papers of the owner would be as much invaded, and the search and seizure would be as much against his will in the one case as in the other; and it must therefore be regarded as equally in violation of his constitutional rights.

> " 'Without discussing them, we cannot doubt that such decisions as there are in conflict with this conclusion are unsound, and that, whether entrance to the home or office of a person suspected of crime be obtained by a representative of any branch or subdivision of the Government of the United States by stealth, or through social acquaintance, or in the guise of a business call, and whether the owner be present or not when he enters, any search and seizure subsequently and secretly made in his absence falls within the scope of the prohibition of the Fourth Amendment, * * *.'
>
> "I can see no difference between a search conducted after entrance has been gained by stealth or in the guise of a business call, and a search for criminal purposes conducted under the guise of an examination for purely civil purposes. Whether the arrangement to have Agent Coram make the appointment with the defendant was by design to obtain entrance for Special Agent Pearson, or whether it was done innocently, the effect insofar as the defendant was concerned was the same. He was deluded into giving consent to the examination of his papers and records and his action in so doing cannot be said to be voluntary in so far as making available his papers for purpose of investigation to establish fraud for criminal prosecution purposes."

And again on page 130 of the opinion:

> "The very factors referred to in that opinion as being lacking and which by implication were necessary to sustain the plea of the Fifth Amendment are present in this case. Here at the time the defendant produced his papers, prosecution was contemplated, whereas * * * there was nothing to indicate that there was any suspicion at the time of the examination that the defendant was guilty of a criminal offense. In the instant case, we have the very frank testimony of

Special Agent Pearson that he had reason to believe that the defendant had been guilty of fraud and that his purpose in making the examination of his papers was to obtain evidence for contemplated criminal prosecution. With these different circumstances I am of the opinion that the Court of Appeals for the 8th Circuit would have reached the conclusion that the defendant was entitled to a warning before the information could be said to have been obtained from the defendant without doing violence to his privilege under the Fifth Amendment. cf., also Himmelfarb v. U. S., 175 Fed. 2d 924, at 938 (49-1 U. S. T. C. 9313).

"Where federal officers violate the Constitution in obtaining evidence 'the federal courts refuse to hear it, esteeming the upholding of the constitutional guaranties against abuse of governmental power more important in such circumstances than the discovery of the truth.' Foley v. United States, 64 Fed. 2d 1. And '* * * the forebearers, after consulting the lessons of history, designed our Constitution to place obstacles in the way of a too permeating policy surveillance, which they seemed to think was a greater danger to a free people than the escape of some criminals from punishment.' United States v. Di Re, 332 U. S. 581, 595, 92 L. Ed. 210, 220.

"To permit evidence to be obtained against a defendant by the means here employed (however innocently it may have been done in this case) would be to encourage overzealous and less scrupulous officers and agents of law enforcement agencies to chip away rights guaranteed by the Constitution to defendants by trick and artifice, to do what could not be done in court proceedings, i.e., compel a defendant to testify against himself.

"The dividing line between proper investigative procedures and those which encroach improperly upon constitutionally guaranteed rights is shadowy and ill-

> defined, but the device here used places itself clearly on the wrong side of that line. I find that the defendant's constitutional rights were violated in that he was induced under a misapprehension of the true facts and circumstances to give his consent to an examination under circumstances which rendered the consent ineffective and the search unreasonable and therefore unlawful. His rights were further violated in that he was induced by reason of the same misunderstanding of the true facts and circumstances to give testimony against himself without proper warning. The evidence and information so obtained by the Government may not be used against the defendant and the motion to suppress evidence and to return property will be granted."

There is also contained in said opinion a discussion of leading cases relied on by the Government in such case, and distinguished by the court.

So far as petitioner can ascertain the Fifth Circuit has been confronted with the precise question here involved on only one previous occasion, to-wit: *White, et al. v. United States, et al., 194 F. 2d 215, writ denied April 21, 1952, 72 S. Ct. 760.* In said case the Fifth Circuit Court affirmed the denial of a motion to suppress. In so doing, however, the court stated, and we quote:

> "While we agree with appellants that if their incriminatory statements had been made, as they claim, not voluntarily, but induced by promise of immunity, they would be entitled to be relieved against their use; we think it plain that no such case was made out." 194 F. 2d 215, 217.

Such a case was made out by the uncontradicted evidence in the instant case.

It is noteworthy that in the trial of the *White* case, supra, reported, *98 F. Supp. 895*, the taxpayer upon first visitation denied any unreported income and only after several weeks' passage of time decided to attempt to bring himself within the voluntary disclosure policy. It is further of interest that the trial court acknowledged that had the taxpayer attempted on the day the agent first came to him, to make a disclosure, then such would have been timely. See also *U. S. v. Lipslietz (D. C., N. Y.), 954, 117 Fed. Supp. 466.*

Be that as it may, however the end be reached, under protection afforded by the Fourth and Fifth Amendments to the Constitution as granted in the *Guerrina* case, supra, and as indicated in the *White* case by the Fifth Circuit Court, or under the immunity afforded by the policy of the Government to those making a voluntary disclosure as in the *Liebster* case, supra, the trial court erred in not sustaining petitioner's motion to suppress.

SUMMARY

The petitioner says that the motion to suppress is based upon uncontradicted facts which clearly warrant the granting of the motion. The facts which warrant the granting of such motion are as follows:

The petitioner while employed with the Buick Division of General Motors, found himself in a position to obtain automobiles for himself and friends and family. At the very inception of the procurement of these cars there was no thought or effort to make a profit. It was simply an

accommodation to friends and family. As time went by many cars were made available and the petitioner found himself able to make money on these transactions. The petitioner knew when he obtained these cars from various Buick dealers that it was against the company's policy to permit employees of the company to avail themselves of these automobiles for resale. Petitioner also knew that if the Buick dealers from whom he was procuring these cars knew that he personally was arranging a resale of these cars, that they would have refused to sell him the motor vehicles. Therefore, in order that the petitioner's superiors not know of these purchases and also to prevent the Buick dealers from knowing that petitioner was obtaining the cars for resale, the cars were procured in names other than his own, and that many of these transactions were made in cash because it was customary among automobile dealers at such time as testified to by various dealers. Petitioner well knew should it come to the company's attention that he was procuring these cars, it would cause him the loss of his employment. Not anticipating that it would be a business venture, he kept no books or records, and also being of the belief that he, being a salaried man, that the separate sales relative to personal automobiles sales were not calculated to be of a business nature and taxable, and therefore he kept no books. The record is clear that after the petitioner had been admonished by a superior in the Buick company, that he, the petitioner, was not permitted to compete with authorized dealers in sales of these automobiles, the petitioner realized that he was earning money

that constituted taxable income. Shortly after learning of this, he acquired a Buick agency and immediately disclosed to his bookkeeper the fact that he had not kept books and records for 1946, 1947 and a part of 1948 and had no accurate record as to the amount of money he had made on the transactions. This bookkeeper (C. J. Britton), suggested the employment of a certified public accountant, whom the petitioner agreed to employ. The accountant was employed in the first week of January of 1949, and after the petitioner made a full disclosure of all transactions that he could recollect, the C. P. A. advised that normally an amended income tax return would solve the problem, however, in the instant matter in view of the inaccuracy of the information concerning the various transactions, an incorrect amended return was just as bad as the incorrect original income tax return, and would afford the taxpayer no relief. The certified public accountant then advised the petitioner that the best thing to do under the circumstances was to lump into his 1948 return an arbitrary sum of money which was not reflected upon the books and records of the Buick agency, thereby attracting the Government's attention and by doing so that same would constitute a voluntary disclosure, and that Government offered immunity to all taxpayers who made a voluntary disclosure, and that when the Government agents came to the petitioner that he would then advise them of this fact and could then procure the Government's assistance in ascertaining the amount of tax due and owing without being criminally prosecuted. Pursuant to such advice and in-

structions the petitioner did lump into his 1948 return an additional $13,000.00 and that when the agents of the Internal Revenue Department called upon the petitioner, some eighteen months later, he immediately advised them that the books and records of the car agency would reflect $13,000.00 less than reported in the 1948 return, and that this was lumped into the return for the specific purpose of attracting their attention in the furtherance of his voluntary disclosure. Petitioner advised the agents of the Government that under the instructions of his certified public accountant that when they arrived he was to tell them that "I have failed to fully report part of 1946, 1947 and 1948, for which I have no books and records, and that I was advised that by making a voluntary disclosure of this fact and assisting you in giving you all the information, that I possess, that I would be immune from prosecution," and the agent Robert W. Klein advised the petitioner, "Yes, that is the Government's policy," and relying upon that statement, the petitioner then proceeded to give to the agents of the Government from his memory and recollection all facts pertaining to the types of automobiles purchased, the models, the approximate cost, the approximate selling price, the various names used in the purchase of said cars, the names of the dealers from whom cars were purchased, giving a complete list of Buick dealers and specifically eliminating dealers which petitioner did not procure cars from as well as all transactions on automobile sales with specific dealers. All of this information was unknown to the Government agents until given by the

petitioner and by the giving of such information petitioner then made available to the Government the means by which they could determine after checking the other car dealers as to the amount of purchases and sales made by petitioner, and that at all times petitioner advised Government agents that whatever figure that they determined was the amount of taxable income that he raised no issue and wanted to pay the tax, penalty and interest and that during the entire period of disclosure by the petitioner, which covered a period of eleven months, that the petitioner made his offices and employees available to the Government agents as well as his own time in the furtherance of the promises of immunity that the petitioner testified that relying upon the representations of Klein, special agent, that it was the Government policy to immune from prosecution this taxpayer because of his voluntary disclosure. That this petitioner did in the furtherance of such reliance give all of the information, his time, his books, his records, and his offices as well as his employees to fulfill all of this voluntary disclosure, and at no time did the Government agents ever advise the petitioner that the information that they were procuring from him might be used in criminal prosecution, but at all times the petitioner believed and had reason to believe it was strictly for civil liability.

It is quite apparent in this case that here is a citizen who, as the record shows, had always been a salaried man, never having enjoyed the fruits and profits of a private enterprise. The evidence also uncontradicted is that in the beginning of his automobile transaction he had not in-

tended or anticipated that there would be a business venture, therefore the petitioner kept no books or records, and further, because of his limited business experience, believed that such income was not taxable. In any event the evidence is uncontradicted that the petitioner immediately after realizing that the monies made on his automobile transactions were taxable income, did what any ordinary prudent person would have done in like or similar circumstances, he immediately employed a certified public accountant and followed the advice and suggestions of said certified public accountant. If it were the intention of the petitioner to defraud the Government, would he have made such a disclosure of unreported income for 1946, 1947 and 1948 to a bookkeeper, then to a certified public accountant, and then to the senior accountant for the accounting firm? This is certainly not likely. The very acts of the petitioner and his conduct, show without contradiction that he was doing everything that a citizen could do to straighten out a tax problem. Not having books and records, being warned by his accountant that he could not file an amended income tax return that was not accurate, then relying upon a person whom he had every right to rely upon, a man trained and skilled in accounting and tax matters, a man licensed to do certified public accounting, the defendant placed all of his confidence and trust in such a person, did everything, and the testimony bears out the fact that he did everything the C. P. A. and senior accountant had advised him to do. Now after making a voluntary disclosure, calling the Government's attention to the facts related herein

and after advising Mr. Klein that this was being given upon reliance of immunity from criminal prosecution, the petitioner was lulled into a sense of security by the special agent Klein, when Klein said "Yes, that is the Government's policy" in reference to immunity by the voluntary disclosure, and then based upon that sense of security, believing himself free from criminal prosecution because of such promise, the petitioner was then placed in the position of giving for a period of many months without any warning by the agents that it would be used against him in criminal action, the evidence that convicted this petitioner. Surely the court would not permit conduct of this nature on the part of Government agents, to hold out a false promise and knowing and believing in their own minds that as soon as they procured the information from this petitioner that would incriminate him, that they would file criminal charges. It would be quite a different thing if after the statement given by petitioner to Klein that he was going to give this information on the promise of immunity that if the special agent then would have told the petitioner, "Mr. Monroe, if we find information or evidence that warrants the filing of a criminal charge, we are going to do it." In that event, the petitioner would have been placed upon notice and could have protected himself by the Fourth and Fifth Amendments to the Constitution, he could have refused to have given evidence that would incriminate him, or if after such a warning he chose to give the information, he certainly could not complain. But can the court sit idly by and permit this type of technique employed by a Gov-

ernment agent, who admitted upon trial of the case that if he succeeded in convicting Mr. Monroe, the petitioner herein, of these charges that it would mean a promotion to him. Your petitioner believes that this thinking and conduct upon the part of the special agent is far more serious than acts which are charged against the petitioner. We do not think that the Government intended to give bonuses for fraud and deceit, and what more clear case of fraud is there when an agent admits that he told the petitioner, after petitioner had advised him that "My C. P. A. told me that if I make this disclosure I will be immune from prosecution," the agent then says, "Yes, that is the Government's policy," knowing full well all the time that he did not intend to keep faith with a citizen.

The questions and answers to which the petitioner refers are on page 588, in Volume 2, Tr., and page 589, which reads as follows:

> "Q. Now Mr. Monroe, do you remember yesterday, on direct examination, I asked you what you had said to Mr. Klein when he came in, with reference to the 1946, 1947 and 1948 returns, and your statement was that Mr. Evans said 'Let your hair down,' and tell him that your 1946, 1947 and 1948 had not been reported, and you had no books and records, and the Government would not prosecute if you made a voluntary disclosure.
>
> "Now after you told Mr. Klein that, what did Mr. Klein say to you?
>
> "A. He said it was the Government's policy.

"Q. After he said that, did you make the disclosure?

"A. I told him everything I could recall from memory about the whole situation. It had been a year and a half, if he had come two weeks later or six years later, I wouldh ave told him the same thing.

"Q. Did you rely on that statement of the Government's policy before you related to Mr. Klein these disclosures?

"A. I certainly did."

The following is the testimony of Agent Klein as found on page 319, Volume 2, Tr.:

"Q. As a matter of fact, you all even discussed as to whether the Government offered immunity to citizens who might voluntarily disclose, do you remember that?

"A. I believe I remember discussing it.

"Q. And didn't he say, 'I understand when you voluntarily disclose you did this and pay your tax, the Government wont' prosecute you,' do you remember him saying that?

"A. I believe that is true.

"Q. And you sat there and said that was true?

"A. Well, I agreed, because that is true."

The question involved in this case is whether a citizen who wants to pay his taxes, who does not have books and records, who follows the advice of his certified public accountant, advised the Government agents he wants to make a voluntary disclosure based on immunity, and such immunity is promised, and is charged iwth and compelled to

pay, and did pay fifty per cent penalty and interest to the Government, should be subjected to a jail sentence and a fine. It is inconceivable that the principles of democracy and good Americanism would permit our conscience to allow such entrapment and such penalties to be inflicted upon an American citizen, when he tries to do what is right and then is stripped of all of the protection that the Constitution of the United States guarantees him.

WHEREFORE, PREMISES CONSIDERED, your petitioner prays that this Honorable Court upon a full and fair hearing hereof sustain the petitioner's motion to suppress and reverse and render in favor of this petitioner, or in the alternative to reverse and remand with the instructions to the Trial Court to suppress such evidence as may be shown to have been obtained from the petitioner, and such other relief, both general and special, as this court may believe that this petitioner is justly entitled.

Respectfully submitted,

HENRY KLEPAK,
JOHN P. KOONS,
808 Texas Bank Building,
Dallas, Texas,
Counsel for Petitioner.

I hereby certify that I have delivered to Honorable Heard L. Flore, attorney for respondent, whose office is in Dallas, Texas, a copy of this petition for writ of certiorari.

HENRY KLEPAK,
Counsel for Petitioner.

UNITED STATES OF AMERICA
STATE OF TEXAS
COUNTY OF DALLAS

WILLIAM FRANK MONROE, being duly sworn, deposes and says:

I am the petitioner in the above entitled action. I have read the foregoing Petition and the same is true as I verily believe.

.....
WILLIAM FRANK MONROE.

SWORN to before me this.....day of November, 1954.

.....
Notary Public in and for Dallas County, Texas

I hereby certify that I have examined the foregoing Petition for or Writ of Certiorari, and in my opinion such Petition is well founded and should be granted by this Honorable Court, and said Petition is not presented for purposes of delay.

.....
HENRY KLEPAK,
Counsel for Petitioner.

OPINION OF THE COURT—Filed August 5, 1954

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 14615

WILLIAM FRANK MONROE, APPELLANT

versus

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the Northern District of Texas

(August 5, 1954)

Before HUTCHESON, Chief Judge, RIVES, Circuit Judge, and RICE, District Judge

RICE, District Judge: Tried to a jury and found guilty on each count of a five count indictment charging him with knowingly and wilfully attempting to evade a large part of the income taxes owing by himself and his wife for the years 1946, 1947, and 1948, in violation of Section 145(b) of the Internal Revenue Code, the defendant has appealed.

Defendant graduated from Baylor University and thereupon engaged for a time in the occupation of singing professionally. He was later employed as a field representative of General Motors Acceptance Corporation, making collections and repossessing automobiles. In May, 1942, he became a Special Agent for the Federal Bureau of Investigation and served in that capacity substantially three and one-half years. He thereafter was employed by the Buick Motor Division of General Motors Corporation, in the capacity of district manager for Northeast Texas. He supervised the operations of some forty dealers in his territory. While so employed, and without the knowledge of his superiors, he engaged in certain lucrative extra curricular activities. Included among these was receiving money under a kickback agreement for allotting additional automobiles. For this service one dealer paid defendant

$1,000.00 per month. These were cash transactions, and defendant kept cash in a safety deposit vault. He also made use of cashier's checks issued in fictitious names. He kept no books or records in reference to these outside activities.

Defendant testified that he did not report the income which accrued to him by reason of these activities because they formed no part of the business in which he was engaged; and did not realize that he should have reported this income for the years 1946, 1947, and 1948, until his superior brought it to defendant's attention while reprimanding him in April of 1948 for some of these activities which defendant's superior had just discovered.

Defendant testified that thereafter his conscience began hurting him, and that in November or December, 1948, he confided in his bookkeeper that he had not been reporting his full income for the years 1946 and 1947, and that the latter advised him to procure an accountant. In January, 1948, he did employ a firm of certified public accountants, and disclosed his problem and sought their advice. Due to his failure to keep books and records the making of a corrected amended return was impossible, and he was advised to compile from memory a list of his unreported income and said accountants would put it in his 1948 return for the purpose of notifying the government that such amount was previously unreported income. Defendant relied on and followed this advice. Defendant further testified that said accountants advised him that the filing of his 1948 return would cause an investigation of the income thus reported and that when representatives of the government came to check his returns he was to explain his situation to them and to cooperate to the fullest extent; that by so doing he would be protected by the immunity granted those making a voluntary disclosure. He further testified that on receiving this advice he finally remembered $13,000.00 of unreported income; and that this sum was reported as income in his 1948 return. From the record and the briefs of the parties it would appear that no explanation was incorporated in the 1948 return showing the source of this income or that it was previously unreported. There the matter lay, from the filing of the 1948 return in March

1949, with nothing further being done by defendant, until August 7, 1950, when Messrs. Klein and Robertson, Agents of the Bureau of Internal Revenue, called at defendant's place of business and requested to see the 1948 return for Monroe Buick Agency.

During the month of May, 1950, Mr. Robert W. Klein, an Agent of the Intelligence Division of the Bureau of Internal Revenue, was ordered to investigate the returns of defendant for the tax years 1946, 1947 and 1948; and on June 1, 1950, defendant's 1946 and 1947 tax returns were "physically" handed over to Mr. Klein. The latter testified that in May, 1950, in his official capacity, he had information defendant had unreported income not disclosed by his return.

Defendant further testified that on the first visit of Mr. Klein he told him that the lump sum of money ($13,000.00) was put in the 1948 return to cover unreported income for 1946, 1947 and 1948, under instructions of his accountant, for the purpose of notifying the government he had made unreported income. That his accountant had informed him that if he made a voluntary disclosure he would not suffer any penalty or prosecution, except for not having kept books and records; that Mr. Klein did not tell him he would not be prosecuted; that he voluntarily gave the agents all the information he had and cooperated with them fully.

Agent Klein testified that during some of his discussions with the defendant the latter said he understood that when "you voluntarily disclose you did this and pay your tax the government won't prosecute you", and that he agreed with this statement.

Prior to commencement of the trial defendant filed his motion to suppress testimony, alleging in substance that relying on the advice of his accountant, and on the announced policy of the Treasury Department, which had previously come to his attention, he had taken affirmative steps to voluntarily disclose to the government that he had earned income in 1946, 1947 and 1948, a portion of which he had not reported; that before giving the specific information in regard to his disclosures he had, on his first contact with the agents for the government, informed them that his intention was to complete his already originated

disclosure; inquired if those who did make voluntary disclosures were not immunized from prosecution, and was informed that such was the policy of the government; that thereafter he gave fully and freely all the information requested by the agents of the government.

This motion was carried along by the court throughout the trial of the case before it was overruled.

It seems to be undisputed that the announced policy of the Treasury Department, during the period here involved, was that a taxpayer who had failed to declare his full income and pay the tax due could escape criminal prosecution through voluntary disclosure of the deficiency only in cases where such voluntary disclosure is made before the investigation is started.

An investigation is considered to be initiated at the time an agent is assigned to the case. *United States* v. *Levy,* 99 F. Supp. 529; *United States* v. *Weisman,* 78 F. Supp. 979; *United States* v. *Lustig,* 163 F. 2d, 88; *White* v. *United States,* 98 F. Supp. 895; same case, 194 F. 2d, 215.

Admissions which are voluntarily made without any false promises or inducements are competent evidence against one charged with crime. *White* v. *United States,* 98 F. Supp. 895.

In respect to defendant's claim to immunity by reason of having made to the government a voluntary disclosure, the trial court charged the jury as set out below.[1] Defend-

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[1] "There has been testimony in this case regarding the Treasury Department's policy of voluntary disclosure. That is an announced policy of said department wherein the government promised immunity from prosecuting under the income tax law to any taxpayer, even the wilful violator, who informs the government that he has neglected to report taxes due and owing, if he does so fully, and before he knows he is under investigation. In connection therewith, you are instructed that if, from the evidence, you believe that the defendant in this case gave information to the Treasury Agents, believing that he was complying with the policy of voluntary disclosure, and that he gave such freely, fully and voluntarily, before he knew that he was personally under investigation, or if you have a reasonable doubt as

ant did not except to the giving of this charge. This charge fully covered defendant's contention. There was ample evidence from which the jury could have reached the conclusion that this was not a case in which government agents were seeking to trap a violator of the law into making admissions against his interest; but was more properly a case where the violator baited a trap for the government by filing in 1948 a return which made no admissions against his interest to provoke an investigation, in order that he might make a "voluntary admission" and thereby secure immunity. In any event, the effect of the jury's verdict of guilty, in view of the court's charge, was that defendant's disclosures were freely and voluntarily made and were not based on any promises of immunity.

Defendant assigns as error the trial court's refusal to give to the jury a requested charge substantially to the effect that appellant was entitled to rely on the advice of others, and that no mistaken advice or belief as to what constituted income was an offense within itself.

We refrain from discussing the propriety of this charge as applied to the facts of this case, for the reason that under all the facts the defendant would be entitled to some such instruction only as to the tax return for 1948. He at no time testified that he relied on anyone's advice as to the returns he made and filed for the years 1946 and 1947. Since the trial court sentenced the defendant on all five counts generally to serve a term of six months and pay a fine of $3,000.00, well below the maximum sentence of five years imprisonment and $10,000.00 fine which the court could have imposed under each of the counts of the indictment, the defendant's rights were not materially prejudiced.

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to the same, then, in such event, you will acquit the defendant and render by your verdict not guilty.

"Now, in order to be considered voluntary, a disclosure must be made before the investigation has been initiated in the case, therefore, it is essential that I define to you the initiation of investigation. An investigation is initiated when a special agent, or internal revenue agent, or deputy collector, or other officer of the agent is assigned to a return, or returns, of a taxpayer for investigation."

We have carefully considered each of defendant's assignments of error and are of the opinion that none of them present reversible error, and that no such error is revealed by the record.

The judgment of the trial court is, therefore, in all things affirmed.

JUDGMENT

Extract from the Minutes of August 5, 1954.

No. 14615

WILLIAM FRANK MONROE

versus

UNITED STATES OF AMERICA

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

ORDER DENYING REHEARING

Extract from the Minutes of October 11, 1954.

No. 14615

WILLIAM FRANK MONROE

versus

UNITED STATES OF AMERICA

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 437

WILLIAM FRANK MONROE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. 33-38) is reported at 215 F. 2d 81. The opinion of the District Court denying a pre-indictment motion to suppress evidence is reported at 110 F. Supp. 507.

JURISDICTION

The judgment of the Court of Appeals was entered August 5, 1954 (R. 771), and a petition for rehearing was denied October 11, 1954 (R. 788).

The petition for a writ of certiorari was filed November 9, 1954. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTION PRESENTED

Whether petitioner was entitled to suppression of evidence allegedly given by him to Government agents in reliance upon the Treasury Department's promise of immunity from criminal prosecution under its "voluntary disclosure" policy, or upon alleged promises of immunity made by the agents.

STATUTE INVOLVED

INTERNAL REVENUE CODE OF 1939:

SEC. 145. PENALTIES.

* * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned

for not more than five years, or both, together with the costs of prosecution.

* * * * *

(26 U.S.C. 1952 ed., Sec. 145.)

STATEMENT

On May 4, 1953, a five-count indictment was filed against petitioner in the United States District Court for the Northern District of Texas, charging him with various wilful attempts to evade income taxes in violation of Section 145(b) of the Internal Revenue Code of 1939. The first and second counts charged him with filing fraudulent individual returns for himself and his wife for the year 1946, computed on the community property basis. The third and fourth counts alleged similar offenses for the year 1947, while the fifth count charged the filing of a fraudulent joint return for the year 1948. The amounts of net income and the taxes due thereon, as reported in the returns and as corrected, were alleged to be as follows (R. 1-6):

		Reported		Corrected	
		Income	Tax	Income	Tax
Counts I & II	(1946)	$ 4,687.48	$ 515.00	$10,128.72	$ 1,751.30
Counts III & IV	(1947)	4,455.00	481.00	21,483.12	5,019.74
Count V	(1948)	44,205.45	13,923.02	64,028.37	24,443.00

After a jury trial petitioner was found guilty as charged (R. 732) and on May 16, 1953, he was sentenced generally to imprisonment for six months and fined $3,000 (R. 733).

Prior to his indictment petitioner filed a civil proceeding in the District Court, alleging that he

had voluntarily disclosed unreported income to the Government prior to the initiation of its investigation in reliance on the Treasury Department's promise of immunity to taxpayers who complied with its so-called "voluntary disclosure" policy, and asking that the Government be restrained from presenting to the grand jury the evidence which he had thus supplied against himself. After a hearing, Judge Atwell found that petitioner's disclosures were neither full and complete nor antecedent to the Government's investigation, and the requested relief was denied on February 26, 1953, over a month before the return of the indictment. *In re Monroe,* 110 F. Supp. 507. There was no appeal and the proceedings are not a part of the present record, although the transcript of the hearing was frequently used in cross-examination of witnesses at the trial. (See, *e.g.,* R. 299-310, 686-687, 699-700.)

On the same day the indictment was returned petitioner filed in the criminal case a motion to suppress evidence.[1] He alleged that during 1946, 1947 and 1948 he had profited from the sale of automobiles without realizing that such profits constituted taxable income; that when he did finally realize this he was unable to determine the exact amount of unreported income and was advised by a certified public accountant to include a lump sum of $13,000 in his 1948 return as an invitation

[1] The files of the Department of Justice reveal that this motion was practically identical with the pleading previously filed by petitioner in the civil action.

to the Government to inspect his books and records; that in so doing he relied on the Treasury Department's "voluntary disclosure" policy; and that when the agents arrived to examine his books he explained everything that had happened and cooperated fully with them. (R. 7-22.) The record does not clearly indicate what happened, but apparently the trial judge, Judge Davidson, reserved his ruling until all the evidence had been presented at the trial and then denied the motion. (R. 64, 461-462, 703, 734, 738.)

The evidence adduced at the trial may be summarized as follows:

Petitioner is a college graduate with a major in mathematics. (R. 523.) After spending most of the period from 1942 through 1945 as a special agent of the FBI (R. 491, 524), he became district manager for the Buick Motor Division of the General Motors Corporation having supervision over Buick dealers in the northeastern section of Texas (R. 494, 532). Late in 1948 he opened his own Buick agency. (R. 503, 544.)

During 1946, 1947 and 1948, when new automobiles were scarce, petitioner, exerting the influence of his position, was able to obtain many such cars which he thereafter sold at a considerable profit to used-car dealers. The Government introduced numerous witnesses to show that petitioner had thus obtained approximately fifty automobiles, frequently using cashier's checks and taking title in the names of third parties. (R. 33-169.) All were

disposed of at a profit (R. 174-224), a large majority of them being sold for cash to two used-car dealers, one of whom, C. J. Britton, became petitioner's sales manager when petitioner set up his own Buick agency in October 1948 (R. 174-186, 213-224). Twenty-four cars were sold in this manner during 1948 alone at a profit of more than $26,000. (R. 275.) Petitioner stipulated (R. 239-241, 260-262) to the correctness of a recapitulation of all this evidence showing the following amounts of unreported income (R. 268, 272, 276, 292):

1946	$6,441.24
1947	18,028.12
1948	19,822.92

At the close of the direct testimony of Revenue Agent Klein, who had presented the above recapitulation, the Government brought out that the investigation of petitioner's returns was begun in May 1950, and that the agents already had information concerning unreported income for the years involved when they first visited petitioner on August 7, 1950. (R. 277, 286-287.) During Klein's cross and re-direct examination (R. 291-451) the following facts were developed with reference to his conduct of the investigation:

On his first visit he asked to see records to support the figures in petitioner's 1948 return. He was shown the books of petitioner's recently formed Buick agency, but he soon discovered that petitioner's return reported $13,399.98 profits for the

agency which did not appear on its books and he asked for an explanation of the discrepancy. Petitioner produced a list showing sales of thirteen automobiles with a profit of $13,399.98 which he represented to be his personal sales for 1948 prior to the time he opened the agency. (R. 338-343.) For the next week, while he was auditing the books, Klein repeatedly asked petitioner for details of these personal deals, but petitioner said he had no records and could not remember either the seller, the purchaser, or the motor number of any of the cars. (R. 344.) Finally, on August 15, 1950, petitioner changed his story and told Klein that the list was fictitious; that it represented an estimate of his unreported income for 1946, 1947 and 1948 from automobile sales and "kickbacks" from dealers;[2] that he had included the amount on the advice of a certified public accountant; and that he wanted the assistance of the agent to determine how much tax he actually owed. (R. 305-307, 345-349, 368-369, 392-395, 414-416, 436.) During the months that followed petitioner gradually named some of the dealers from whom he had obtained cars, and in December or January he finally admitted that he might have sold some to Britton, who, of course, as petitioner's sales manager, was close at hand throughout the investigation. (R. 349-351, 364, 617-623, 632-633.) Petitioner consistently maintained that he had no records of his

[2] Two dealers had paid petitioner, while he was still district manager, to obtain new cars for them over and above their normal allotment. (R. 83-85, 101-104.)

personal car deals, never volunteered information that his bank accounts and purchases of cashier's checks would be helpful to the agents, and it was necessary for the agents to track down laboriously the specific details.[3] (R. 317, 320, 330, 333, 360-366.)

Petitioner testified that he had been accustomed to paying income taxes on his salary and that it never occurred to him that his profits on the personal car deals constituted taxable income until he was rebuked by his superior early in 1948 for violating company policy by selling cars in competition with authorized dealers.[4] (R. 498-500.) A certified public accountant[5] told him early in 1949 that he could not file amended returns without adequate records, and advised him to make a "voluntary disclosure" by estimating his unreported income and including a lump sum in his 1948 return with a notation explaining what it represented. (R. 505-508.) However, the accountant's employee, in preparing the return, neglected to make the proper notation and included petitioner's $13,399.98 estimate with the 1948 income from the agency, thus making it impossible to tell from the face of the return that previously unreported income was being included. (R. 563-571; cf. 643-645.) In sharp conflict with Agent Klein's version of the first meeting on August 7, 1950,

[3] The investigation lasted over eight months. (R. 310.)

[4] He admitted on cross-examination that this explanation was unbelievable. (R. 533.)

[5] The accountant died before trial. (R. 642.)

petitioner testified that he informed the agent before he had even looked at the books that they would not reflect the $13,000 lump sum which had been included in the 1948 return upon instructions of his accountant to notify the Government of unreported income, and he insisted that he had assisted the agents by giving them numerous specific details relative to his personal car sales. (R. 510-517.) On cross-examination he admitted that, although almost ninety percent of the cars had been sold to Britton and Lynch, he did not tell the agents this until about eighteen months after the investigation began (R. 547-551); that, while he was "worried sick" about the disclosure to be made in the 1948 return, he did not even look the return over before he signed it (R. 561-565, 587-588); and that, while he had allegedly included the $13,000 lump sum as unreported income, his readily available records would have revealed unreported income of around $50,000 (R. 579-582).

In rebuttal the Government showed that the accountant's employee who prepared the 1948 return had received no instructions about a lump sum to represent unreported income and that, on the contrary, petitioner told him that the sum of $13,399.98 represented his personal car sales during 1948. (R. 684-685, 688-689.) It was also shown that the agents already knew, before they arrived at petitioner's place of business on August 7, 1950, that he had not reported all his income for 1948. (R. 690-692; cf. 419-425.)

ARGUMENT

The present petition seeks review of factual questions resolved adversely to petitioner by the jury and by three lower courts.[6] In the civil proceeding[7] (*supra*, pp. 3-4 and fn. 1), in his motion to suppress evidence (R. 9-11, 13-14, 15, 16), and in the defense testimony at the trial (*supra*, pp. 8-9), petitioner contended that he had attempted to make a "voluntary disclosure" in his 1948 return, that he disclosed the facts to Agent Klein before any questions were propounded to him on Klein's first visit, and that, lulled by the silence of the agents into the belief that he had obtained immunity, he continued for over a year to give them evidence of his unreported income. The present petition, relying almost exclusively upon the defense testimony at the trial (Pet. 14-16, 22-31), assumes that these questions are open for review here. But the evidence was sharply conflicting on all these factual issues and, unfortunately for petitioner, these issues and the verity of the defense testimony were all determined adversely to petitioner by the jury and by the courts below. It is settled that these

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[6] Cf. *United States* v. *Lustig*, 163 F. 2d 85 (C. A. 2d), certiorari denied, 332 U. S. 775; *White* v. *United States*, 194 F. 2d 215 (C. A. 5th), certiorari denied, 343 U. S. 930.

[7] Actually the questions now raised were *res judicata* at the trial as the result of petitioner's failure to appeal the adverse decision in the pre-indictment civil proceeding, *In re Monroe*, 110 F. Supp. 507. See *Steele* v. *United States*, 267 U. S. 505; *Cogen* v. *United States*, 278 U. S. 221, 226-227; *United States* v. *De Angelo*, 138 F. 2d 466, 468 (C.A. 3d); and cf. *Nelson* v. *United States*, 208 F. 2d 505, 515-517 (C. A. D. C.), certiorari denied, 346 U.S. 827.

concurrent findings, which are amply supported by the record, will not be independently reviewed here in the absence of exceptional error. *Comstock* v. *Group of Investors*, 335 U.S. 211, 214; *Goldman* v. *United States*, 316 U.S. 129, 135; cf. *United States* v. *Johnson*, 319 U.S. 503, 518; *Delaney* v. *United States*, 263 U.S. 586, 589-590.

It is clear that the 1948 return did not constitute a "voluntary disclosure" for petitioner himself admitted (R. 566-569; cf. 643-646) that it could not be determined from the face of the return that the $13,000 plus figure, allegedly inserted as unreported income in part from previous years, was anything other than current income from his recently opened Buick agency. Furthermore, the jury and the courts below would have been amply justified in concluding that this sum did not represent previously unreported income, but represented petitioner's personal car sales for 1948 prior to the opening of the agency.[8] Petitioner so indicated to Agent Klein and to Lowery, the accountant's employee who prepared the 1948 return. (*Supra*, pp. 7, 9.)

Nor did petitioner's conduct at the outset of the investigation amount to a "voluntary disclosure". Petitioner, of course, testified that he notified Agent Klein immediately after the agent's arrival on August 7, 1950, that he had not reported all his income. But according to the agent, peti-

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[8] Actually, the evidence revealed that petitioner's profit from 1948 personal sales was $26,000. (*Supra*, p. 6).

tioner concealed this fact for a week and his disclosures thereafter could hardly be described as full and complete. (*Supra*, pp. 6-7.) Furthermore, the "voluntary disclosure" policy of the Treasury Department, since abandoned, required a full and complete disclosure prior to the time the return had been assigned to an agent for investigation (R. 468, 476-477), a fact which petitioner recognized (R. 15-16), and in this case Agent Klein had been at work on petitioner's return for almost three months before their August 7 meeting (*supra*, p. 6).

What has already been said disposes of petitioner's final contention that he was lulled into security by the silence of the agents. It is clear from the testimony of Agents Klein and Robertson (*supra*, pp. 6-8, R. 693-697) that only after they had checked his books for a week and had asked numerous questions did petitioner begin to disclose unreported income.[9] There is not the slightest evidence that any promises were made and the mere fact that Klein, at some indefinite time during the investigation, discussed the "voluntary disclosure" policy generally with petitioner (R. 319, 412-414) obviously provides no basis for such a conclusion. Nor was it necessary for the agents to warn petitioner that his admissions might be used against him. *Wilson* v. *United States*, 162

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[9] When Robertson asked petitioner why he had changed his original story of the $13,000 petitioner said (R. 697):

> "Robertson, at the time you called, I didn't think you were going to give me as thorough a checking as you did."

U.S. 613, 621-624; *Powers* v. *United States,* 223 U.S. 303, 312-314; *Himmelfarb* v. *United States,* 175 F. 2d 924, 938 (C.A. 9th), certiorari denied, 338 U.S. 860; *United States* v. *Heitner,* 149 F. 2d 105, 107 (C.A. 2d), certiorari denied *sub nom. Cryne* v. *United States,* 326 U.S. 727; *United States* v. *Block,* 88 F. 2d 618, 620-621 (C.A. 2d), certiorari denied, 301 U.S. 690.

The jury was instructed (R. 710) that it could give to the fact that petitioner voluntarily furnished information such weight as might seem proper on the question of his intent to evade income taxes. In addition, the Treasury Department's "voluntary disclosure" policy was defined and the jury was directed (R. 710-711) to acquit petitioner unless satisfied that he had not in good faith complied with the policy. This additional instruction was more than petitioner was entitled to, for it in effect left it to the jury to determine whether the evidence disclosed to the agents by petitioner should be considered.[10] It is settled that the determination of preliminary questions of fact in connection with the admissibility of evidence is within the exclusive province of the trial judge. *Ford* v. *United States,* 273 U.S. 593, 605; *Steele* v. *United States, supra,*

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[10] Even if petitioner had made a full disclosure, he would have gained no right to immunity from prosecution and the institution of prosecution would not have been foreclosed. *White* v. *United States,* 194 F. 2d 215, 217 (C. A. 5th), certiorari denied, 343 U. S. 930. See also *Whiskey Cases,* 99 U. S. 594; *Gladstone* v. *United States,* 248 Fed. 117 (C. A. 9th), certiorari denied, 247 U. S. 521; *United States* v. *McCormick,* 67 F. 2d 867 (C. A. 2d), certiorari denied, 291 U. S. 662.

p. 511; *Gila Valley Ry. Co.* v. *Hall,* 232 U.S. 94, 103; see also *Nardone* v. *United States,* 308 U.S. 338, 341; *United States* v. *Carignan,* 342 U.S. 36, 39. Petitioner's factual assumptions have been determined adversely to him, not only by one, but by three, finders of fact, Judge Atwell, Judge Davidson and the jury.

CONCLUSION

The decision of the court below is correct, there is no conflict of decisions, and further review is not warranted. It is respectfully submitted that the petition for a writ of certiorari should be denied.

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